Nos. 87-470 and 87-614

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1987

No. 87-470

FORT WAYNE BOOKS, INC.

Petitioner,

v.

STATE OF INDIANA, et al.,

Respondents.

No. 87-614

RONALD W. SAPPENFIELD, et al.,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA AND THE INDIANA COURT OF APPEALS

BRIEF OF RESPONDENTS STATE OF INDIANA AND STEPHEN M. SIMS ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

1. Is the Indiana criminal RICO statute (I.C. 35-45-6-1 *et seq.*, the Indian Corrupt Business Influence Act) as applied to obscenity offenses unconstitutionally vague in violation of the First, Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Does the use of obscenity or an obscenity related offense, other than child pornography, as a predicate offense of the Indiana RICO statute violate the First Amendment to the Constitution of the United States?

3. Is Indiana's criminal RICO statute violative of the First and Fourteenth Amendments to the Constitution of the United States to the extent that it allows prosecution for criminal RICO on the basis of two or more allegations of obscenity violations which have not been reduced to convictions?

4. Are the first amendment procedural safeguards of *Heller v. New York*, 413 U.S. 483 (1973) violated by a state law which allows the arrest and prosecution of an individual for criminal RICO based upon predicate allegations of obscenity violations, not reduced to conviction, without allowing, post-arrest, a prompt adversary hearing to determine the probable obscenity of items upon which the prosecution is based?

5. Is Indiana's civil RICO statute, authorizing pre-trial padlocking and post-trial forfeiture of entire communicative businesses solely on the basis of two or more obscenity offenses, facially unconstitutional under the First Amendment as a prior restraint on protected expression?

6. Do the forfeiture, padlocking and other sanctions of Indiana's civil RICO statute, constitute an overly broad means of regulating the dissemination of obscenity?

7. Do the Indiana civil RICO statute's pre-trial sanctions of mass seizure and padlocking lack sufficient First Amendment

procedural safeguards where they can be imposed based solely upon an *ex parte* probable cause determination of obscenity?

8. Do seizure, padlocking and forfeiture sanctions such as those upheld by the Indiana Supreme Court, violate the First Amendment by unduly chilling the exercise of protected expression?

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OPINION BELOW

I.

SAPPENFIELD V. INDIANA

The decision of the Indiana Court of Appeals, First District, published at 505 N.E.2d 504 (1987) appears in the Appendix

hereto. (Consolidated Joint Appendix 176, hereinafter referred to as "J.A."). A timely petition for rehearing was filed and denied without opinion. (J.A. 182). A timely petition for transfer was filed with the Supreme Court of Indiana and was denied without opinion. (J.A. 183).

II.

FORT WAYNE BOOKS, INC. V. INDIANA

The decision of the Supreme Court of Indiana reported as *4447 Corporation v. Goldsmith* is published at 504 N.E.2d 559 (Ind. 1987) and is printed at pages 104-112 of the Appendix to the Petition for a Writ of Certiorari. The decision of the Indiana Court of Appeals is published at 479 N.E.2d 578 (Ind. App. 1985) and is printed at pages 28-98 of the Appendix to the Petition for a Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIRST AMENDMENT — Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

FIFTH AMENDMENT — No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT § 1 — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The provisions of Indiana Code Chapter 34-4-30.5 (Indiana's civil RICO statute), Indiana Code Chapter 35-45-6 (Indiana's criminal RICO statute), and Indiana Code Section 35-49-2-1 (Indiana's statutory definition of obscene material) are set forth in Appendix A of this brief.

STATEMENT OF THE CASES
SAPPENFIELD V. INDIANA

In 1984 a local law enforcement officer purchased several magazines at two stores allegedly owned or operated by the Petitioners. The magazines contained graphic photographs of homosexual and hetersexual activity (*Sappenfield* Record 20-23, 65-275). After examining the magazines, the county prosecuting attorney filed criminal charges against the Petitioners alleging that the Petitioners had participated in the distribution of obscene material in violation of the criminal laws of Indiana (J.A. 135, 138-149). Among the eight counts of the charging information were two counts (Counts IV and VIII) which alleged violations of Indiana's Criminal RICO statute.

On June 4, 1985, the Petitioners moved to dismiss Counts IV and VIII (the RICO Informations) on the grounds, *inter alia*, that the RICO statute was unconstitutionally vague and violative of the Fourteenth Amendment (J.A. 150). On September 18, 1985, the trial court held that the RICO statute could not constitutionally be applied to violations of the Indiana obscenity statute (J.A. 173). The decision of the trial court was reversed by the Indiana Court of Appeals.

Respondent Stephen M. Sims, as prosecuting attorney, secured 39 criminal convictions against various people employed by the Petitioner and others for distributing obscene material at certain business locations. On March 19, 1984, the prosecuting attorney filed a complaint in the Allen Circuit Court alleging that the Petitioner and other named defendants had engaged in a pattern of racketeering activity (J.A.8).

Following an *ex parte* hearing, the Allen Circuit Court found that probable cause existed to support a finding that the assets of the Petitioner were derived from or being used in a pattern of racketeering activity. The trial court ordered the seizure and inventory of Petitioner's assets.

The Petitioner participated in hearings before the trial court on March 29, 1984, and April 4, 1984 (Fort Wayne Record 478, 574). No trial date has been set by the trial court in this case because the Petitioner sought an Extension of Time Within Which to File an Answer to the Complaint (Fort Wayne Record 640), and immediately thereafter deprived the trial court of jurisdiction by initiating an interlocutory appeal (Fort Wayne Record 646).

SUMMARY OF THE ARGUMENT

This Court has consistently ruled that the states may prohibit the distribution of obscene material. Obscene communicative material is not entitled to First Amendment protection.

If Indiana can show that the Petitioners have engaged in the criminal act of distributing obscene material, then Indiana may impose criminal and civil sanctions against the Petitioners.

Indiana asserts that persons engaged in a pattern of criminal activity may not shelter the assets derived from or used in the criminal activity by combining the criminal activity with an enterprise which is entitled to First Amendment protection. Thus, a person who uses a newstand as a front for illegal gambling activities cannot prevent the government from seiz-

ing his place of business. Nor can a person who profits from the sale of illegal drugs invest the profits in a radio station and thereby prevent the government from tracing and seizing the profits. The question is whether criminal assets are secure from government seizure when the assets are invested in speech related activities.

ARGUMENT

I.

THE INDIANA OBSCENITY STATUTE

The Indiana Obscenity Statute (Ind. Code 35-49-2-1, App. A) is an almost direct enactment of this Court's main holding in the benchmark case of *Miller v. California* 413 U.S. 15 (1973). The elements of "obscene matter of performance" are whether:

> (1) The average person, applying contemporary community standards, finds that the dominant theme of the matter or performance, taken as a whole, appeals to the prurient interest in sex;
>
> (2) The matter of performance depicts or describes, in a patently offensive way, sexual conduct; and
>
> (3) The matter or performance, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The statute specifies "contemporary community standards" as the test to determine whether the appeal to the prurient interest in sex is predominant. In *Smith v. United States* 431 U.S. 291 (1977) this Court added that "patent offensiveness" is also to be judged by the same standard. But *Smith v. U.S.* also pointed out that the third prong of the *Miller* test, the lack of serious literacy, artistic, political, or scientific value is *not* to be determined by that standard, but rather on the question whether a reasonable person would find such value in that material, taken as a whole. *Pope v. Illinois*, ___U.S. ___, 107 S.Ct. 1918 at 1921, (1987). *Miller* also required that a state must specifically define the "sexual conduct" whose depiction

or description is subject to being alleged obscene. Indiana has complied: The matter or performance must depict or describe "sexual conduct." Ind. Code 35-49-2-1(2). "Sexual conduct" is exactly defined in objective factual terms under Indiana Code 35-49-1-9 (App. A).

When Indiana's statutory scheme on obscenity is viewed as a whole, it clearly requires the existence of the depiction or description of the items described in Ind. Code 35-49-1-9. In other words, explicit sexual activity. This depiction must be so gross as to be "patently offensive". The matter in which it is imbedded must not only appeal as a whole to the interest in sex, but to the "prurient" interest therein; moreover, this must be the dominant theme of the work. Even so, such work still cannot predicate a RICO action unless it lacks serious literary, artistic, political, or scientific value.

Miller explicitly holds that works defined by the standard enunciated therein are not protected by the First Amendment. It seems to be a common tactic by persons subjected to an obscenity action to assert that one or another work, clearly outside the *Miller* standard or the given statute, and hence not subject to the State action, is within it, and postulate a hypothetical future prosecution of such works. in this instance, as we have seen, petitioners seek to dress their unprotected product in the First Amendment armor borrowed from *Playboy*, *Penthouse*, prospective 20th Century Fox or Universal films, and some hypothetical videotapes or books speculatively sold by Walden books or B. Dalton's. Overlooked is the fact that such material rarely depicts "sexual conduct" as defined by the statute, does not do so in a "patently offensive" way, does not lack the requisite value, and when taken as a whole does not appeal to the *prurient* (i.e., unhealthy) interest in sex.

Thus, taken either as a substantive penal statute directed against obscenity or as a predicate to RICO action, Indiana's criminal obscenity statutes are properly circumscribed to assure against encroachment on First Amendment grounds.

II.

INDIANA'S RICO STATUTES: VAGUENESS, OVERBREADTH CHILLING EFFECT

The Indiana RICO statute closely resembles the federal RICO legislation found at 18 U.S.C. § 1961 *et seq.*. The policy reasons for the adoption of RICO statutes are clearly set forth in *Russello v. United States*, 464 U.S. 16 (1983), and need not be repeated here. The federal RICO statute has withstood challenges for vagueness and overbreadth. *See U.S. v. Tripp*, 782 F.2d 38 (6th Cir. 1986) *cert. den.* 106 S.Ct. 1656; *U.S. v. Martino*, 648 F.2d 367, reconsidered in part 650 F.2d 651 (5th Cir. 1981) *cert. den.* 456 U.S. 943, 949, *on reh.* 681 F.2d 952 affirmed 104 S.Ct. 296; *U.S. v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978) *cert. den.* 441 U.S. 933.

Facially, Indiana's RICO statute is no broader or more vague than the federal legislation.

In *Brockett v. Spokane Arcades, Inc.*, 105 S.Ct. 2794 (1985) this Court dealt with constitutional overbreadth and reaffirmed the following guidelines for review of state statutes:

1. Never anticipate a question of constitutional law in advance of the necessity of deciding it.

2. Never formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.

3. One to whom applicability of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.

4. The same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected.

5. A law maybe narrowed by (1) legislative action, (2) judicial construction or (3) partial invalidation.

6. If a term in a statute is potentially overbroad, the law should be invalidated only so far as the term is to be understood as reaching protected materials.

7. Even if a term can only be interpreted in an unconstitutional sense, the proper remedy is to excise the term and leave the rest of the statute in place.

The danger most feared by the Petitioners is that a RICO civil action will close down and seize assets of an enterprise defined in the criminal RICO statute (IC 35-45-6-2) as being conducted though a pattern of racketeering activity; or an enterprise acquired or maintained, conducted, or derived through such activity. Among the complaints lodged in this Court about the RICO statute is that its effects are "Draconian." If so, this effect is unrelated to the nature of the business seized or the violation alleged as a predicate, and independent of any speech material that may be involved. RICO's purpose is "to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States*, *supra*. The federal RICO statute's provisions are to be liberally construed to effectuate its remedial purposes. *United State v. Turkette*, 452 U.S. 576 (1981). Indiana's Supreme Court has recognized that the seizure of assets acquired through racketeering was one of the statutes most important remedies. The mere contention that the RICO statute is a strong remedy does not establish that it is improper.

The Indiana Supreme Court in *Goldsmith v. 4447 Corporation*, 504 N.E.2d (1987) correctly recognized that First Amendment protections do not extend to any of the matter which can be used to predicate a RICO action based on obscenity dealing. As demonstrated at length above, Indiana's obscenity statute reaches only *unprotected* speech. Since no RICO predicate offense can infringe on First Amendment territory, the fact that a species of speech is involved in obscenity cannot be used to distinguish an obscenity racket from, for instance, a drug, prostitution, gambling or even an arson or murder for hire racket for purposes *either* of charging a criminal RICO violation *or* seizing assets of such an enterprise

derived from or conducted through a pattern of racketeering activity.

Petitioners and *amici* cite a number of obscenity and prior restraint cases going back as far as the classic *Near v. Minnesota*, 283 U.S. 697 (1931). What these cases all have in common, however, is that the prospective State action was explicitly premised on some content of the speech aspect of the material (or on prospective speech content in the *Near* and other prior restraint cases). The speech involved was sought to suppressed on the theory that it was obscene, or would be libelous, or would threaten public order. (E.g. *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977).

But a civil forfeiture and seizure action under RICO remedies does not concern the identity of the items seized. Its clear intent is to attack the incentive for racketeering enterprises by seizing the business stock of the enterprise and/or all property derived from the enterprise — what could best be called "ill gotten gains".

Goods so seized can be anything from a stock of stolen cars, auto parts, and repair manuals used in a stolen car "chop shop" racket, to school bonds or a collection of Picassos bought with the profits. The cars, parts, manuals, bonds and paintings should be and are equally subject to seizure and forfeit under the civil RICO act. This is so even though a Picasso painting is clearly an item of speech, and one with undeniable artistic value as well and hence is protected speech.

Petitioners are seeking nothing less than the creation of an exemption for an entire class of property from RICO seizure. They wish to appropriate the First Amendment and use its hard-won protections for the purpose of establishing a "safe" class of property that can be invested in and used in racketeering enterprises, or which can be purchased through the procedes of racketeering, secure from the threat of RICO seizure forfeiture. If the Court were to adopt the confusion between First Amendment prior restraint law and RICO seizures fostered by Petitioners it would be doing no less than opening the

entire field of First Amendment protected property and enterprises as safe havens — and thus targets — for investment of the procedes of organized crime. Racketeers could put their money in Byzantine icons or Renaissance religious art. They could buy speech-related businesses from bookstores to daily newspapers from video stores to TV networks. The clear purpose of the RICO statute would be vitiated if the defendant in a seizure action could prevent it by a claim that among the property was protected — or even just "presumptively protected" — speech.

The Indiana court in the *4447* case recognized this when it held "that the purpose of the forfeiture provisions is totally unrelated to the nature of the assets in question. The overall purpose of the anti-racketeering laws is unequivocal, even where the predicate offense alleged is a violation of the obscenity statute. The remedy of forfeiture is intended not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity. Stated simply, it is irrelevant whether assets derived from an alleged violation of the RICO statute are or are not obscene."

In making that holding, the Indiana court followed the holding of the Federal district court in *Western Business Systems, Inc. v. Slaton*, 492 F.Supp. 513 (N.D. Ga. 1980), which also held that any chattel derived from racketeering was subject to seizure "totally unrelated to their contents." The forfeiture, the district court held, was not due to any likelihood of obscenity, "but because they were personal property realized through or derived from crime." *Id.* at 514.

Petitioners, and to an even greater extent the *amici*, profess a fear that indiscriminate attacks on speech-related business might ensue based on sexually explicit but protected materials. It has already been shown that underlying obscenity statute is carefully drafted to include only the material that this Court has held, in *Miller* and elsewhere, to be unprotected.

Parties and *amici* present no suggestion that any of the seizures that occurred in these cases was based on predicate

material that actually was subject to First Amendment protection. There is no showing of any prospect that a film studio or theatre business would be shut down for distribution of Bertolucci's *Last Tango in Paris* or Nichol;s *Carnal Knowledge*; or that a bookstore or chain of stores would be seized for selling *Penthouse* or even such sexually explicit material as Anais Nin's frankly acknowledged erotic writings titled *Delta of Venus*. Indeed, all these titles have been available to adults in Indiana without suppression by the State.

Indiana's statute, in short, provide for judicial determination that there is probable cause to believe that an enterprise has knowingly and intentionally undertaken a pattern of distribution of obscene matter as a criminal offense. While it is true that probable cause was shown *ex parte* in these cases, it is also true in general that an opportunity for adversary consideration of the status of the predicate allegedly obscene matter was rejected in favor of pursuing these interlocutory actions. There is no reason to thus assume that, when predicate matter is seized or brought as evidence of a violation of IC 35-49-3-1 as a basis for RICO actions rather than direct obscenity violations, in such cases an adversary hearing is not available to the defense to examine the predicate matter. There is no reason, however, to provide such a hearing for the business assets seized under the RICO act since, as shown above, First Amendment issues are not relevant.

Since Indiana's obscenity statute is carefully circumscribed so as to affect only unprotected speech, and provides a clear workable definition of what is obscene, neither it nor RICO criminal and civil actions predicated upon it are unconstitutional. The racketeer has control over what business stock to acquire for his racket or into what goods he will invest his racketeering procedes. If First Amendment protected matter is chosen by him, then that is his choice, not the State's. The government ought to be able to pursue racketeering procedes no matter into what form the racketeer has chosen to convert them. The State action in seizing them is directed against that choice, not against their content. Since content of the matter

seized under RICO is irrelevant to the action, then can be no constitutional objection based on their content. Indiana's obscenity and RICO statutes, facially and as interpreted, are not improper.

III.

EX PARTE HEARING AND SEIZURE

The Petitioners contend that Indiana's RICO statutes are deficient 1) because they do not require that an *adversary hearing* on the question of obscenity *precede* a seizure under the statute, 2) because they do not guarantee that the restraint imposed will be of *short duration*, 3) because they do not ensure *prompt appellate review* of either interim or permanent seizure orders, and 4) because the statute does not require that the State satisfy a standard of proof greater than the probable cause standard.

Indiana's RICO statute should not be invalidated simply because it does not require that a seizure be preceded by an adversary, as opposed to *ex parte*, hearing on the issue of obscenity. *Heller v. New York*, 413 U.S. 483 (1973) indicates that a statutory scheme which 1) provides that seizure is to be preceded by a judicial determination of probable cause, and 2) makes *available the opportunity for post-seizure review* in an *adversary* proceeding, is sufficient for First Amendment purposes. 413 U.S. 489, 492-493. While *Heller* is distinguishable from the case at bar by virtue of the fact that the seizure in *Heller* was accomplished in order to preserve evidence for trial, 413 U.S. at 491, the Supreme Court's discussion of the type of hearing which is required in order to safeguard First Amendment rights is instructive. After noting that it had earlier held that only a judicial determination in an adversary setting is sufficient to impose "a valid *final restraint*" (Emphasis added), the *Heller* Court explained that it had *not* required, and by implication was not going to require "that the advisory hearing taken place prior to *initial* seizure". 413 U.S. at 490.

Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964) 1723, 12 L.Ed.2d 890, and *Marcus v. Search Warrants of*

Property at 104 East 10th St., Kansas City, MO, 367 U.S. 717 (1961) held, as the Court explained in its decision in *Heller*, that a seizure of a large quantity of books "for the sole purpose of their destruction" requires "*a prior judicial determination of obscenity in an advisory proceeding*". *Heller*, 413 U.S. at 492. In *Heller* the Court reaffirmed this requirement, stating "We do not disturb this holding. Courts will continue to scrutinize my large-scale seizure of books, films or other materials presumptively protected under the First Amendment to be certain that the requirements of a *Quantity of Books* and *Marcus* are fully met." *Heller*, 413 U.S. at 492. *Marcus* and a *Quantity of Books* are factually distinguishable from *Heller* and *Fort Wayne Books*, because they each involved seizures which were not based upon a prior and independent judicial determination of obscenity.

Further, as noted in *Heller*:

> The necessity for a prior judicial determination of probable cause will protect against gross abuses, while the availability of a prompt judicial determination in an adversary proceeding following the seizure assures that difficult marginal cases will be fully considered in light of First Amendment guarantees, with only a minimal interference with public circulation pending litigation.

(402 U.S. at 367).

In the *Sappenfield* case, there has been *no ex parte* hearing resulting in a seizure of assets. In the *Fort Wayne Books, Inc.* case, the Petitioner was provided with an immediate adversary hearing. (*See Statement of the Case, supra*). Any delay in the ultimate resolution of factual issues in *Fort Wayne Books* is attributable to the Petitioner who instituted an interlocutory appeal.

Petitioner's reliance on *California ex rel. Cooper v. Mitchell Bros.*, 454 U.S. 90, (1981), at 93, is apparently misplaced. The Petitioner's reliance is misplaced for the very reason indicated in his Petition for Certiorari; the Supreme Court "did not resolve the question of the minimal standard of proof that is

constitutionally required" to permanently restrain exhibition of a specific allegedly obscene film. Other cases, however, such as *Heller*, 413 U.S. at 494, and *New York v. P.J. Video, Inc.*, 106 S.Ct. 1610, at 1614-1616 (1986), strongly suggest, if they do not dictate, that the probable cause standard is sufficient to protect First Amendment rights. *See also*, *United States v. Spilotro*, 680 F.2d 612 (9th Cir. 1982), and *United States v. Long*, 654 F.2d 911 (3d Cir. 1981).

IV.

LEGITIMATE STATE INTERESTS

As noted by this Court in *Russello*, *supra*, state and federal governments have a strong and legitimate interest which is expressed in RICO legislation.

There is no evidence that Indiana's inclusion of obscenity as one of the predicate RICO offenses was a pretext for simply closing adult bookstores, (*See* Concurring Opinion of Justice O'Connor in *Arcara v. Cloud Books* 106 S.Ct. 3172 at 3177 (1986), in which it was pointed out that such a pretexual use of a *nuisance* statute would implicate First Amendment concerns), and the RICO statute's forfeiture provision does not discriminate with regard to the content of the property to be seized and ultimately forfeited. The United States District Court for the Southern District of Georgia, in its opinion in *Western Business Systems v. Slayton*, 492 F.S. 513, at 514 (1980 N.D. Ga) followed just such an approach in rejecting the argument that Georgia's RICO statute constituted an unconstitutional prior restraint as applied to the predicate offense of obscenity:

> At this preliminary point in the litigation, it seems to the court that plaintiffs have grounded the prior restraint portion of their case on a misreading of the statute. Plaintiffs' argument assumes that printed materials would be subject to forfeiture under GA.Code 26-3405 because the owner-operator had two prior obscenity convictions in connection with this or other businesses, and the forfeited materials were used in the same kind of business. They argue that the statute thus allows forfeiture of printed

> matter on the basis that it is probably obscene, and therefore this constitutes a prior restraint. This attempted reading does great violence to the words of the statute.
>
> As the court reads the statute, Ga.Code § 26-3403 prohibits the acquisition even of legitimate businesses with the proceeds of racketeering (as defined). *Under § 26-3405 all property, of whatever nature and no matter how inoffensive, if it is acquired with racketeering proceeds, is subject to forfeiture to the state. These chattels might be anything from from gardening equipment to cook books, and might also be sexually explicit materials. Forfeiture could apply to any chattel whatever, if it was acquired with the proceeds of racketeering. Thus, if the items seized are books or movie films, the seizure is totally unrelated in their contents. They would be forfeited under the statute not because of any likelihood of obscenity, but because they were personal property realized through or derived from crime.*
>
> Similarly, the law enforcement officer authorized by § 26-3405(d)(2) to seize materials prior to the filing of a complaint would be seizing them upon probable cause to believe that they were subject to forfeiture, and not—as plaintiffs argue—upon his personal judgment that the objects are obscene. We must keep in mind that these objects may be anything.

(Emphasis added). The Idaho Supreme Court's decision in *State ex rel. Kidwell v. U.S. Marketing Inc.* (1981), Idaho, 631 P.2d 622, at 628-629, contains an excellent general discussion of civil forfeiture actions and prior restraint, and also accepts the premise that the state may impose a forfeiture "on neutral and innocent property used in the commission of forbidden acts."

CONCLUSION

While it is possible for this Court to hold that communicative material can only be seized after an opportunity for an adversary hearing, such a holding is not mandated by the Constitution and is not support by case law of this Court. (Such a holding would require a striking down of the statutory provi-

sion for an *ex parte* hearing, not a striking down of the provision establishing obscenity as a predicate offense.)

Petitioners have shown no logical or constitutional basis for holding that property used in or gained from a criminal activity (distributing obscene material) should be protected while other property derived from or used in criminal activities may be forfeited.

It is intended that RICO statutes have a chilling effect only on certain criminal activities including the distribution of obscene material. There has been no showing by the Petitioners that the RICO legislation is any more restrictive or chilling than Indiana's general obscenity statute.

The orders entered by Indiana courts under Indiana's RICO statutes are directed against property which allegedly has been used in or derived from a pattern of criminal activity. (The Petitioners have not been enjoined from any activity, and both are currently engaged in the business of selling books.) It is the criminal activities of the Petitioners or their employees which triggers the imposition of RICO sanctions against the property. The First Amendment does not protect the Petitioners from the consequences of participating in criminal activity.

The Indiana RICO statute should be upheld in its entirety.

Respectfully submitted,

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